In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5488

GANDALFO ALBANESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the right of an Organized Crime Strike Force attorney to appear before a grand jury, the sufficiency of the evidence to sustain petitioner's conviction of the substantive offenses charged, the correctness of the court's instructions, and the propriety of sentencing petitioner without a pre-sentence report.

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on all three counts of an indictment charging him and four co-defendants with conspiracy to distribute and possess heroin, and two substantive acts of distributing heroin, in violation of 21 U.S.C. 846 and 841(a)(1).[1] Petitioner was sentenced to concurrent terms of nine years' imprisonment

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[1]Co-defendants Battiloro, Goronsky, and DuBois pleaded guilty; co-defendant DuBois testified for the government; co-defendant Gregoris was a fugitive at the time of trial.

on each count, to be followed by a six-year term of special parole. The court of appeals affirmed without opinion (Pet. App. A; 519 F. 2d 1397).[2]

The evidence showed that in April 1974, DuBois went to petitioner's Manhattan butcher shop where he asked petitioner, whom he knew well, if he could supply heroin for two old friends, Battiloro and Goronsky, explaining that Goronsky had been his son's partner. On a second visit by DuBois about two days later, petitioner said that he could obtain an eighth of a kilo for $4,500. DuBois relayed this offer to Battiloro and Goronsky, who accepted it. Petitioner told DuBois that the first delivery would have to be through DuBois, after which they would "play it by ear" (Tr. 69-74).

On April 24, 1974, undercover narcotics agent Alleva arranged with Battiloro and Goronsky for the purchase of an eighth of a kilo of heroin for $5,300. After testing a sample, which proved to be heroin, the agent confirmed the agreement (Tr. 18-23), and met Battiloro in an apartment in Brooklyn, where Goronsky opened the door and Battiloro delivered the heroin. At the agent's direction, Goronsky drove him to another address, where he obtained the money and paid Goronsky (Tr. 23-25). On the following morning, Battiloro paid DuBois, who in turn paid petitioner (Tr. 75).

On the evening of May 7, the agent met Battiloro in Brooklyn and arranged for delivery of a quarter kilo of heroin for $10,600. A surveilling agent observed the transfer of a package from DuBois' car to Battiloro's car, following which, in the early morning hours of May 8,

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[2]"Pet. App." refers to the appendix to the petition for a writ of certiorari; "Tr." to the trial transcript; and "App." to the appendix in the court below, which we are lodging with the Clerk.

Battiloro and Goronsky delivered a quarter kilo of heroin at a Brooklyn apartment and thereafter received the promised $10,600 (Tr. 27-30, 178). Battiloro paid DuBois and, on the following day, DuBois paid petitioner (Tr. 80).

A third heroin transaction between the same parties, but this time taking place in the Southern District of New York, was aborted on May 14, 1974, by the arrest of Battiloro and Goronsky and seizure of the narcotics. The involvement of DuBois was thereafter discovered. He was arrested and agreed to cooperate with the government (Tr. 31-34, 80-84).

On May 31, 1974, DuBois, wearing a transmitter, which failed to function, visited petitioner's butcher shop. Petitioner threatened DuBois with dire consequences unless arrangements were made for payment for the narcotics lost in the May 14, transaction; a further meeting was planned for a Manhattan bar (Tr. 84-86). This meeting took place on June 3, with DuBois again wearing the transmitting device. DuBois suggested that Goronsky's stepfather might be able to raise part of the money. The prior dealings with Battiloro and Goronsky were discussed and petitioner criticized them severely for failure to get their money "up front" (Tr. 93-136). The meeting was observed by two narcotics agents and a tape of the conversation between petitioner and DuBois was admitted in evidence (Tr. 179-185, 193-195, 198-203).

1. Petitioner's contention (Pet. 5) that a strike force attorney is not authorized to participate in grand jury investigations is the same contention rejected by the Eighth Circuit in *United States* v. *Wrigley*, 520 F. 2d 362, certiorari denied, No. 75-5284, November 17, 1975. There is no reason for further review here.

2. Petitioner claims (Pet. 6-8) that the evidence was insufficient to establish beyond a reasonable doubt his

guilt as to the substantive counts. But viewed most favorably to the government, *Glasser* v. *United States*, 315 U.S. 60, 80, the evidence supports petitioner's convictions on those counts. Petitioner's initial arrangements for the delivery of the heroin, its actual delivery, and his demands for its purchase price were sufficient to show his actual or constructive possession and his intent to distribute. See *United States* v. *Gomez-Rojas*, 507 F. 2d 1213, 1221-1223 (C.A. 5). Moreover, since petitioner's sentence on the conspiracy count was identical to and concurrent with the sentences on the substantive counts, further review of the evidence supporting the substantive counts is unnecessary. *Barnes* v. *United States*, 412 U.S. 837, 848.[3]

3. Petitioner argues (Pet. 9) that the trial court gave an improper instruction to the jury as to the possibility of the heroin having come from a source other than petitioner. In arguing his motion for judgment of acquittal, petitioner's counsel urged, as he has here, that the evidence failed to show that the heroin received by DuBois from petitioner was the same as that which the agent bought from Battiloro and Goronsky, and that there was not another supplier involved (App. 9a-15a). In discussing Counts 2 and 3, the court told the jury (App. 36a):

> Mr. Rosenkrantz pointed out it is possible the heroin which Battiloro and Goronsky sold to Agent Alleva was something that they got from another heroin dealer or that the packages that were analyzed by the chemists were not in fact the packages that Mr. Albanese delivered to Mr. DuBois. You can determine from the evidence whether this leaves you

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[3]The record does not support petitioner's assertion (Pet. 7) that the trial court had "grave misgivings" in submitting the substantive counts. See App. 11a-13a. The court later told the jurors that their verdict of guilty on all three counts was "probably the only verdict that is proper on the evidence" (App. 45a-1).

> with any reasonable doubt that the heroin that was purchased by the agent did in fact come from Mr. Albanese.
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> In other words, it's possible to find the defendant guilty of conspiracy beyond a reasonable doubt and not guilty beyond a reasonable doubt of Count 2 or Count 3. That's for your determination.

Petitioner's counsel objected, pointing out that what he had said was to the court out of the presence of the jury and that he at no time conceded to the jury that petitioner had delivered any packages to Mr. DuBois. The court immediately called in the jury and told them (App. 43a):

> I have just one thing to add. I spoke about the possible defense that the packages analyzed by the chemist were not the packages delivered to Mr. DuBois. The defendant does not concede that any packages were delivered to Mr. DuBois by Mr. Albanese. That's for you to determine on the basis of all the evidence in the case.

There was no further objection. In view of the prompt correction, there was no reversible error. The short time during which the jury deliberated on its verdict, rather than being attributable to this incident, as petitioner argues (Pet. 10), more probably reflects the overwhelming proof of petitioner's guilt.

4. Petitioner contends (Pet. 11) that because there was no pre-sentence report, he is entitled to be resentenced and to be physically present during the resentencing. The facts as to the original sentencing are as follows:

Immediately after the verdict was returned the court inquired whether petitioner's bail should be continued. The prosecution argued that petitioner, who had been convicted of trafficking in narcotics, should be remanded

to custody; the defense argued that the risk of flight was minimal. The court decided that petitioner would remain on bail until sentencing, which would be expedited by not awaiting a pre-sentence report (App. 46a-50a).

At the sentencing hearing, at which petitioner and his counsel were present, the court dictated into the record its reasons for considering this an appropriate case in which to dispense with a pre-sentence report. It stated (S. Tr. 3-5[4]) that because of the age and illness of the chief government witness and because it intended to remand petitioner to custody pending appeal, the appeal should be expedited if possible. The court further stated that the testimony concerning petitioner at trial and the letters submitted by petitioner's attorney since trial gave it sufficient information about petitioner's character, apart from his role in selling heroin, and that, as the co-defendants had already been sentenced, comparative culpability was more important than personal characteristics in the circumstances of this case.

Rule 32(c)(1), Fed. R. Crim. P., provides that a pre-sentence report can be omitted if "the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record." That is precisely what the court did here. Petitioner's contention (Pet. 11) that the sentencing without the report "was an empty gesture" is unsupported and is contradicted by the full and careful sentencing hearing. Petitioner's questioning of the efficacy of a subsequent motion under Rule 35, Fed. R. Crim. P., for reduction of sentence, does not alter the lawfulness of the proceedings.

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[4]"S. Tr." refers to the transcript of the sentencing proceeding, which we are lodging with the Clerk.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.